Supreme Court of the United States.

OCTOBER TERM, 1902.

SOLOMON L. SWARTS, TRUSTEE IN BANKRUPTCY OF SIEGEL HILLMAN DRY GOODS COMPANY,
APPELLANT,
vs.
L. F. HAMMER, JR., COLLECTOR OF THE REVENUE OF THE CITY OF ST. LOUIS, MISSOURI.
No. 641.

STATEMENT. SPECIFICATION OF ERROR AND ARGUMENT FOR APPELLANT.

STATEMENT.

The Siegel-Hillman Dry Goods Company was adjudged bankrupt on February 8, 1900, and thereafter, on March 8, 1900, Solomon L. Swarts was elected and qualified as trustee of the bankrupt estate. On June 1, 1900, said Swarts, as such trustee, had in his hands and on deposit in the designated depository $68,320.00 in money belonging to the bankrupt estate. On February 24, 1902, the

respondent, as collector of the revenue, filed a petition alleging that State, school and city taxes for the year 1901 had been regularly assessed against the property in the possession of said trustee on June 1, 1900, said property being said sum of $68,320, and that a tax bill for said tax, properly certified, had been delivered to said collector for collection, and prayed for an order directing the trustee to pay respondent the sum of $1,298.08, the amount of said tax bill, together with the accrued penalties, fees and commissions, as provided by the State law. Appellant, as trustee, filed an answer to the petition, denying that the taxes sought to be collected by the petitioner, were a legal and proper charge against the trustee, or that the same ought to be paid by said trustee out of the funds of the estate in his hands. The District Court ordered the trustee to pay the collector the sum of $1,298.08, being the face of the tax bill. From the decision of the Circuit Court of Appeals affirming the order so made, this appeal is taken by the trustee.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals erred in holding that the money in the hands of a trustee in bankruptcy is liable for taxes assessed by the State of Missouri under a State statute which provides that "every person owning or holding property on the 1st day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

ARGUMENT.

The question presented by the record in this case is whether money deposited by a trustee in the designated depository of the court is, under the bankruptcy law of 1898, liable for taxes assessed by a State under a State statute which provides that "every person owning or holding property on the 1st day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year" (R. S. Mo., 1899, Sec. 9188).

Appellant contends that property in the possession of a trustee in bankruptcy is not taxable by the State for the reasons: First, that the State has no sovereignty over that property, and, therefore, cannot tax it; second, that the bankruptcy act does not provide for the payment of such taxes; and, third, that the laws of the State of Missouri do not expressly make such property taxable.

I.

As to the first proposition, our position may be briefly stated as follows: —

The people of the United States, by Article 1, Section 8, of the Constitution, have granted to Congress the power "to establish uniform laws on

the subject of bankruptcy throughout the United States." That power necessarily includes the power to establish rules for the distribution of the bankrupt's property, and, inasmuch as the laws on the subject are required to be uniform, when Congress, acting under that power, passed the present bankruptcy act and therein prescribed rules for the distribution of a bankrupt's property, the Federal government thereby took exclusive control of that distribution, and no other sovereignty, be it State or foreign, is permitted to exercise any power that burdens or in any manner interferes with the distribution prescribed by the act.

The principle for which we contend lies at the bottom of our system of government and was early established by the decision of this court in the case of McCulloch v. State of Maryland, 4 Wheat. 316, and the language of Chief Justice Marshall in his opinion in that case is applicable almost in its entirety to the question now before the court.

That the power thus granted by the people to Congress is a sovereign power, is clear. "All legislative powers," says Chief Justice Marshall, "appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power."

As the distribution of the bankrupt's estate is a necessary part of the bankruptcy system, it follows that the enactment by Congress of a law prescribing the method of such distribution was an exercise of sovereignty on the part of the United States government.

That when Congress enacted the present law, that law became supreme, will be admitted. As said by Chief Justice Marshall in the McCulloch case, "The government of the United States, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'"

Not only is the bankruptcy law supreme with reference to the distribution of a bankrupt's property, but, since the laws on the subject of bankruptcy are required by the Constitution to be uniform, that law vests in the Federal government *exclusive* sovereignty over the bankrupt's property.

As said by Mr. Justice Bradley, speaking for this court in Robbins v. Shelby Taxing District, 120 U. S. 489, at page 492: "The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, *or admit only of one uniform system or plan of regulation.*"

This language is equally applicable to the power of Congress to establish a system of bankruptcy, since the Constitution requires that the system so established be uniform. It must be apparent that to admit State taxation of the bankrupt's property, would deprive the system of uniformity, since property located in two or more States, the title to which is vested in a trustee in bankruptcy, would bear taxes differing in amount and varying with the State

in which it is located, and the amount which creditors of the bankrupt would receive would vary accordingly, being dependent upon the taxes imposed by the respective States in which the property might be located.

It will also be apparent that the trustee might under certain circumstances be compelled to pay taxes for the same year on the same property to two different States. Suppose, for example, that the bankrupt had his residence in the State of Missouri, but owned real estate in the State of Illinois. Let us assume further that the laws of Illinois provide that every person owning property on the 1st day of May should be liable for taxes thereon for the ensuing year. If between the 1st day of May and the 1st day of June this property is sold by the Trustee, and the proceeds come into his hands prior to the 1st day of June, he would be required to pay taxes for one and the same year both to the State of Illinois and to the State of Missouri on the same property or its equivalent.

It is true that this same inequitable situation would be presented where the property is not in bankruptcy, but that result would follow as an incident to the sovereiguty of the respective States, and only shows the more clearly that such sovereignty cannot be admitted in respect of property which the Federal government is required to distribute under uniform rules.

We beg to suggest that the proposition here contended for differs from that urged before this court in the case of Hanover National Bank v. Moyses,

186 U. S. 181, where it was held that Section 6 of the present bankruptcy act, recognizing exemptions allowed by the local laws at the time of the filing of the petition, does not render the act objectionable as lacking in uniformity. In that case it was held that the uniformity required is geographical, not personal, and that "no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors;" in other words, that the act does no more than confine creditors to such property as other legal process could reach. A different question, we submit, but one more analogous to the one now being considered, would have been presented, had the act provided for the allowance of any exemptions that might be prescribed by State laws in force at the time of the distribution of the estate. Such a law, we submit, would not be uniform.

If it be true that the power of establishing rules for the distribution of a bankrupt's property rests exclusively with Congress, and the rules prescribed by Congress are the Supreme law of the land, it would seem to follow that a State cannot tax that property while it is under the dominion of the bankruptcy law. If the State can take two per cent of this property in the exercise of its sovereignty, it can in theory take it all, and thus wholly prevent that distribution which Congress has prescribed. It will not do to say in answer to this, that the State will not take more of this property than of any other property. The question here is not what

the State will do; it is rather a question of the power of a State and of the repugnancy of such power to a constitutional law of the Union.

"The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government." (McCulloch v. Maryland, *supra.*)

In the language of Judge Cooley: "Any power which in its nature acknowledges no limits, and which in a lawful and legitimate exercise may be carried to the extent of an absolute appropriation of property or destruction of the franchise or privilege upon which it is exerted, must, as a power of one sovereignty be incapable of being attempted within the jurisdiction of another for exercise at the discretion of the power wielding it." (Cooley on Taxation, 2 Ed. Chap. 3, p. 83).

It may be urged that as this property, prior to the adjudication in bankruptcy, was under the sovereignty of the States, and, therefore, subject to taxation like all other property, there is no reason why it should escape taxation at the hands of the States while it is being administered in bankruptcy. But is not the same thing true of property that is in the act of being exported from a State or of property that is being transported from one State to another? This court has held that "no State has a right to lay a tax on interstate commerce in any form, whether it be in the way of duties laid on the transportation of the subjects of that commerce, or on

the receipts derived from that transportation, or on the occupation or business of carrying it." (Leloup v. Mobile, 127 U. S. 640.)

And in Kelley v. Rhoads, 188 U. S. 1, it was held that no State could tax property that was being transported from one State to another, even though it remained within that State for a reasonable time required by the transportation.

In the case of Philadelphia & Reading R. R. Co. v. Pennsylvania, 15 Wall. 232 (21 L. Ed. 146), it was held that a State act imposing a tax on freight, so far as it applies to articles carried through the State, or articles taken out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

In all of these cases, the reason of the decision has been that an exercise of sovereignty on the part of the State was an interference with the operation of constitutional laws enacted by Congress to carry into effect the power vested in the national government.

As said by this court in its opinion in the last mentioned case, delivered by Mr. Justice Strong: "While upon the one hand it is of the utmost importance that the States should possess the power to raise revenue for all purposes of a State government, by any means, and in any manner, not inconsistent with the powers which the people of the States have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which

defeats the avowed purposes of the Federal Constitution, *or which assumes to regulate or control subjects committed by that Constitution exclusively to the regulation of Congress.*"

We are unable to see why the imposition of a tax on the funds which a court of bankruptcy is directed to collect and distribute in the way prescribed by Congress, does not hamper or interfere with the distribution of those funds.

The principle which permits the taxation of property owned by agents of the Federal government has no application to the question we are considering. Such taxation does not necessarily hinder the efficient exercise of the power of those agents to serve the government, and the decisions permitting such taxation were expressly based upon that ground. It has, however, always been held that "A tax upon the operation of these agents is a direct obstruction to the exercise of Federal powers" (R. R. Co. v. Penniston, 18 Wall. 5), and upon similar principles a tax upon property over which Congress has lawfully taken supreme and exclusive control, and which it has ordered distributed under prescribed rules, necessarily interferes with and is a direct obstruction of the exercise of Federal powers.

That the right of a State to demand of the bankruptcy court taxes accruing even prior to bankruptcy proceedings must be traceable to the provisions of the bankruptcy act, was held in the case of In Re Stuyvesant Bank, 12 Blatch. 189, decided under the act of 1867, where the court says: —

"Preference is given by the bankrupt act, as it usually is by the State laws, to debts due the State in which the bankruptcy proceedings are pending. As sovereign authority upon a subject within the jurisdiction of the Federal authority, Congress provides, first, for the payment of debts due the United States. In apparent deference to the authority which would be supreme, except for its own intervention, it enacts that the debts due the State in which the proceedings are pending, shall next be paid. This preference exists simply because the act of Congress so enacts, and if Congress had not so enacted, or if it should afterwards enact otherwise, the preference would cease. It is a rule of distribution merely, and if Congress should abolish the preference given by the act to either government, it would be an exercise of undoubted power, and no rights or liens would be infringed. The power to establish a system of bankruptcy carries with it the power to establish the details of the system as Congress shall think proper."

If it be true, of debts which became due to the State prior to the bankruptcy proceedings, that a preference exists as to them simply because the act of Congress so enacts, *a fortiori*, it must be true as to State debts accruing after the institution of bankruptcy proceedings.

In its opinion in the case at bar, the Circuit Court of Appeals holds that, inasmuch as a bankrupt's property has not been exempted from State taxation by the bankruptcy act, therefore it is subject to such

taxation. If we are right in our position, it does not require exemption by Congress to free a bankrupt's property from taxation, but it requires permissive legislation by Congress to subject such property to taxation, and the permitted taxation would have to be uniform in order to be constitutional.

The Circuit Court of Appeals seems to liken this case to the taxation of a receiver of a Federal court appointed in an ordinary equitable proceeding. It is true as stated in the opinion of the Court of Appeals that property in the custody and control of receivers and trustees of the Federal courts has always been held to be subject to taxation under the State laws the same as other like property, but clearly a trustee in bankruptcy occupies a different position from a receiver or trustee in an ordinary judicial proceeding, in this, that the disposition of the funds in his hands is prescribed by an act of Congress which is the supreme and exclusive law with reference to such distribution, and the bankruptcy court, which is but the means created by Congress to carry that distribution into effect, has no power to vary or enlarge the rules prescribed by Congress for such distribution. A court of bankruptcy is a court of limited jurisdiction in respect to the distribution of property in its hands; its duty is to ascertain whether there is anything in the bankruptcy act which provides for the relief sought, and if no authority for the granting of that relief can be found in the act, the bankruptcy court must deny it. On the other hand, a court of equity acting under its common-law

powers, administers, not the substantive rights given by a law of Congress, but rights arising out of the general principles of equity jurisprudence. Its jurisdiction is a general jurisdiction, and if the claim presented to it be meritorious, its duty is to ascertain whether there is anything in the general principles of the law which forbids granting the relief sought.

We concede that a court of bankruptcy should exercise the powers granted it by the act in accordance with the principles of equity, but we submit that the extent of those powers is to be ascertained from, and is limited by, the language of the bankruptcy act.

Collier on Bankruptcy (3d Ed.), page 8 and cases cited.

II.

We come now to the consideration of the question: To what extent does the bankruptcy act of 1898 provide for the payment of State taxes out of funds in the custody of the bankruptcy court? The only provision of the act bearing directly upon this inquiry is section 64, which is as follows: —

(*a*) "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with

the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

(*b*) "The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who, by the laws of the State, or the United States, is entitled to priority."

In addition to the foregoing section, we call attention to sections 70a and 47a of the bankruptcy act, the former vesting title to the bankrupt's property in the trustee as of the date of adjudication, and the latter requiring trustees to "collect and reduce to money the property of the estates for which they

are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest."

It would seem quite clear that Section 64 does not provide for the payment of any State taxes assessed against the trustee. It does clearly provide for the payment of "*all taxes legally due and owing by the bankrupt*," and, upon the principle *expressio unius est exclusio alterius* it would seem to follow that no other taxes are to be paid. Would not the words "by the bankrupt" be rendered meaningless if section 64 were interpreted as requiring the court to order the payment of *all* taxes that might be assessed by the State?

Furthermore, it is to be observed, as stated by the Referee in this case, that to impose upon trustees in bankruptcy the duty of making returns and of paying current taxes will tend to obstruct and prolong the administration of bankrupt estates.

This is evident from the provisions of the statutes of Missouri governing the assessment and collection of taxes.

Section 9186 of the Revised Statutes of Missouri of 1899 provides that "every person owning or holding property on the 1st day of June, including all such property purchased on that date, shall be liable for taxes thereon for the ensuing year."

Section 9144 provides that "the assessor or his deputy shall between the first days of June and January proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof in the following manner:

He shall call at the office, place of doing business, or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county in this State, in accordance with the provisions of this chapter."

In addition to the foregoing provisions, the statutes provide for the manner of assessing taxes by the assessor (including the right of appeal to a Board of Equalization) and also for the payment of taxes (see Judson on Taxation in Missouri, chapter 13, page 201).

Under these statutes a person owning or holding property on June first, is liable for taxes thereon for the ensuing year. The statutes require that between June 1st and January 1st following, the owner of property must return a list of taxable property owned, controlled or managed by him (Sec. 9144). After the taxes are duly assessed, the tax bills are turned over to the collector, and they are not ready for payment until about the 1st day of October of the following year. So that in the present case the taxes on property in the possession of the trustee on June 1st, 1900, were not payable until October of the following year. It must be evident that the imposition of these taxes would tend to obstruct and prolong the administration of bankrupt estates, and while this of itself might not furnish a sufficient reason for denying the right of the

State to assess and collect taxes from the trustee, yet in view of the provisions of the bankruptcy act requiring the estate to be closed as expeditiously as possible, no unnecessary inferences ought to be made in favor of such taxation.

In this connection we call attention to the fact already adverted to, that the property of the bankrupt at the time of the appointment of a trustee may be located in different States, and may have already been subjected to taxation in those States, before it comes into the possession of the trustee, and in this way the property be subjected to double taxation. Furthermore, much time may be consumed in the recovery of this property by the trustee, the settlement of the bankrupt estate may be delayed for several years where claims are disputed, and the orderly administration by the trustee may be interfered with by conflicting and debatable claims of various jurisdictions, and the funds belonging to the trustee be measurably diminished, if State taxation of the bankrupt's property be permitted.

The precise question involved in this case, so far as we have been able to ascertain, has been passed upon only in the case of In re Sims, 118 Fed. 356, decided by the District Court for the Western District of Georgia, where the court held that the funds of a bankrupt's estate in the hands of the trustee are subject to State taxation. In that case it is admitted by the court that the act does not expressly provide that funds held by officers of the court pending the litigation should be liable to taxation, but the court proceeds upon the reasoning that a tax

is a debt due to government, and that the levying and collecting of such tax is an exercise of sovereignty, and that nothing will be presumed against such sovereign right. The opinion in that case is based largely upon the decision of this court in the case of U. S. v. Herron, 20 Wall. 251 (22 L. Ed. 275). That case involved the question whether the liability of a surety on the bond of a United States public officer was discharged by the bankruptcy of such surety. It was held that such a conclusion should not be adopted unless the intention of the law to discharge such liability is expressed in clear and unambiguous terms. The basis of that decision was that the legislature will not be presumed to have intended to take away the prerogatives, right, title or interest of the sovereign, that is to say, of *its* sovereign. The decisions relied on by this court are English cases, where the relations of Parliament to the Crown were in question, and Federal cases where the rights of the Federal government were sought to be controlled by enactments of Congress. The principle applied was that "The Crown is not bound, unless specifically named." If this were a case in which the right of the Federal government to the collection of taxes was involved, the application of the Herron case would be clear, but as the States are not sovereign with respect to such measures as are vested by the Constitution in Congress, we are unable to see the application of that case to the present inquiry. If the sovereignty of the States continues over the property in the hands of a trustee in bankruptcy, then it can continue to tax

that property; if, on the other hand, as to that property, its sovereignty ceases, then the maxim that "the Crown is not bound, unless specifically named," has no application. Certainly it has no application to the relation between the States and Congress in respect of any constitutional law enacted by Congress.

The only other cases, so far as we know, in which the construction of Section 64 of the bankruptcy act in reference to the payment of State taxes has been referred to, are the cases of

In re Conhaim, 100 Fed. 246; 4 A. B. R. 58; and

In re Keller, 109 Fed. 131; 6 A. B. R. 351;

In the Conhaim case, upon a petition filed by the purchaser of a bankrupt stock, asking for an order upon the trustee to pay taxes which had been assessed on the stock in the name of the petitioner, the court, while denying the petition, directed the trustee to have assessed in his own name as trustee, the taxes which under the law should have been assessed against and paid by the bankrupt. It is apparent from a reading of the case, that the order of the court amounted only to a direction that the trustee pay taxes legally due and owing by the bankrupt, since the taxes which he was ordered to pay were the taxes for which the bankrupt became liable prior to the adjudication in bankruptcy. The decision was, therefore, clearly within the spirit, if not the letter, of Section 64.

In the course of his opinion, however, Hanford, J., uses the following language: "The manifest intent of the law is, that while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes, which would be collectible under the law, if the property remained in the possession and control of the bankrupt himself."

Taken in connection with the point actually decided in the case, there is nothing improper in this *dictum*. Nothing can be clearer than that Congress did not intend that the custody of the trustee should constitute a barrier to prevent the collection of taxes, which would be collectible under the law, if the property had remained in the possession and control of the bankrupt himself. On the contrary, it is clear that Congress intended that that custody should not constitute a barrier to prevent the collection of taxes he was legally liable to pay, since the act expressly gives a preference to such taxes. If, however, the *dictum* be regarded as asserting that the State has a right to make the trustee pay other taxes than those mentioned in the act, we deny that there is any warrant in the language of the act for such an assertion.

In the Keller case the facts were these: The bankrupt owning a stock of goods was adjudged a bankrupt on December 24, 1900, and the trustee was appointed January 7, 1901. The statutes of Iowa provided that property should be listed and assessed each year in the name of the owner thereof on the first day of January, and that taxes upon

stocks of goods should be a lien thereon, and continue a lien thereon when sold in bulk, and might be collected from the owner, purchaser or vendee. (It will be noted that on January 1, 1901, the bankrupt was the owner of the stock.)

This stock was, on February 12, 1901, sold in bulk by the trustee *free and clear of all liens*, and the court very properly held that the equities as between the trustee and the purchaser required that the trustee should pay the taxes assessed on January first for the year 1901. A mere statement of the facts of the case is sufficient to show that the decision was correct, and that the right to tax a trustee under the bankruptcy law was not even remotely in question. The taxes were legally assessable against the bankrupt and constituted a lien on the stock. The court very properly said in deciding the case: "The equity in favor of the bank (the purchaser) does not grow out of the provisions of Section 64 of the bankrupt act, which provides for the payment of all taxes legally due and payable, but is based upon the fact that the property, being in the custody of the court of bankruptcy, was ordered to be sold at public auction free and clear from all liens."

The court adds, however, by way of an *obiter dictum*, the following:—

"There is nothing in the language or purpose of the bankruptcy act which justifies the holding that claims for taxes due the State, county or city are not to be recognized and properly protected by the trustee. Section 64 already cited makes it the duty

of the trustee to pay all taxes legally due and owing" (the court here omits the words "by the bankrupt") "in preference to the claims of creditors, and while it may be true, as is claimed by counsel for the trustee, that this section refers only to taxes that have been levied and are due and payable in the complete sense of these words, yet the enactment of the section shows that Congress recognized claims for taxes to be so highly meritorious that preference in payment over ordinary debts is granted thereto in the distribution of bankrupt estates."

We submit that, in so far as this language may be taken as referring to the right of the State to receive taxes assessed against the property *while it is in the course of administration*, it is wholly unwarranted by the language of the act or by any principle which should govern the court in construing the act. While the court was perhaps justified in saying that the language of the act ought not to be construed as confining the court to ordering the payment of taxes that have been levied and are due and payable in the complete sense of these words, the court was certainly not justified in holding that there is anything in Section 64 which shows that Congress recognized any claims on the part of the State for taxes except those which could be held to be due from the bankrupt. If Congress had intended that the court should order all taxes imposed by the State to be paid, why did Congress in its instructions to the court of bankruptcy confine itself to ordering the payment of taxes legally due and owing by the bankrupt?

That Congress intended that the court should order the payment of such State taxes only as are assessable against the bankrupt is evident, not only from the language of the act itself, but also from a comparison of the act of 1898 with that of 1867. The act of 1867 in section 28, being section 5101 of the Revised Statutes of the United States, and being the section of the act of 1867 which corresponds with the one under consideration, provides for the payment of "all debts due to the State in which the proceedings in bankruptcy are pending, and of all taxes and assessments made under the laws thereof." It also provides, in language almost identical with that of the present act, for the payment of "all debts due to any persons who, by the laws of the United States, are, or may be, entitled to a priority," and then adds this clause, "*but nothing contained in this title shall interfere with the collection and assessment of taxes by the authority of the United States or any State.*"

The distinctions between the present act and that of 1867, in reference to State taxes, are at once apparent. The present act provides in terms only for the payment of "all taxes legally due and owing by the bankrupt," while the act of 1867 provides for the payment of "all taxes and assessments made under the laws of the State." Furthermore, the present act omits the clause contained in the act of 1867, which forbade any such construction of the act as would warrant an interference with the assessment and collection of taxes by authority of the State. It would seem that the act of 1867

intended that the bankrupt estate should continue to be assessed for State taxes. It is certainly apparent from a comparison of the two acts that Congress intended by the act of 1898 to provide for the payment of "all taxas legally due and owing by the bankrupt," and none other. If Congress intended by enacting Section 64 to require the payment of all taxes that the State should see fit to impose during the course of the administration of the bankrupt estate, then why did Congress omit from this bankruptcy act the provisions of the former act, which expressly required that "all taxes and assessments made under the laws of the State" should be paid and which forbade the court of bankruptcy to interfere with the assessment and collection of taxes by the authority of the State, and insert in lieu thereof a provision which requires only the payment of "taxes legally due and owing by the bankrupt?"

Surely the changes made by Congress in the language of the act are significant of its intention. As said by this court in the case of Bardis v. Bank, 178 U. S. 524, where the question was as to the jurisdiction of the Federal Circuit and District Courts under the act of 1898: "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of Section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

The Referee, in deciding the case at bar, appar-

ently felt that no inference favorable to the payment of these taxes could be drawn from the language of Section 64a, providing for the payment of taxes legally due and owing by the bankrupt; he, however, held that this tax was payable as part of the "actual and necessary cost of preserving the estate subsequent to filing the petition." We submit that the Referee's construction of this portion of Section 64 is unwarranted. Certainly if Congress intended by the clause providing for the payment of "actual and necessary cost of preserving the estate," the payment of State taxes pending the administration of the estate, some reference would have been made to the first part of the section, wherein State taxes are specifically provided for. To say that State taxes on the fund in the possession of the trustee are a part of the actual and necessary cost of preserving the estate, is to assume, not only that the property is taxable under the laws of the State, but also that the provisions of the bankrupt act permit the payment of such taxes. We submit, on the other hand, that unless we can find something in the policy or purposes of the bankrupt act which justifies the conclusion that Congress intended that such property should be subject to taxation by the State, the property is not subject to such a tax, and, therefore, the payment of such a tax is not an actual and necessary expense of preserving the estate.

State taxes are levied "for the support of the government of the State, the payment of the State debt and the advancement of the interests of the State" (Sec. 9118, R. S. Mo., 1899). If the

bankrupt's property is administered under the exclusive sovereignty of the United States, how can taxes for the support of the State government, or the payment of the State debt, or the advancement of the State's interest, be any part of the necessary cost of preserving the bankrupt's estate? With these purposes the bankruptcy act is not concerned except in so far as Congress has therein taken cognizance of them.

III.

We submit finally that the trustee is not the owner or holder of the money deposited by him in the designated depository, and that he has neither the charge, care nor management of such money, within the meaning of the statutes of Missouri relating to taxation. We have already sufficiently referred to the provisions of the statutes of Missouri with reference to taxation.

It will doubtless be conceded that unless the tax which is sought to be imposed upon the trustee can be sustained as being within the words of the statute, it cannot be sustained as within its spirit. In the case of City National Bank v. Charles Baker Co., 6 N. E. Rep. 223, Judge Holmes of the Supreme Court of Massachusetts, held that where there was no statute expressly authorizing a receiver to be taxed, but there was a statute authorizing the taxation of property held by assignees in insolvency, bankruptcy, or for the benefit of creditors in a voluntary assignment, the language of the statute plainly did

not extend to receivers, and that the mere fact that a receiver had deposited money in bank to his own credit, thereby becoming technically the owner of the credit, did not render him liable to taxes, merely because he held the legal title.

That the power to assess a tax must be clearly given in order to be exercised, has been decided in State ex rel. v. R. R. Co., 149 Mo. 635, and cases therein cited.

It is true that under the statutes of Missouri, it has been held that a curator in possession of the property of a minor is taxable as one having the care, charge or management of the property, State ex rel. v. Burr, 143 Mo. 209, and in that case the court said: "The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right, but that of which he has the care, charge or management." But we submit that a trustee in bankruptcy neither owns nor holds money belonging to the bankrupt estate in the sense in which a curator or other trustee appointed to take charge of and manage an estate, owns or holds the same. Clearly in the case of the curator, the property is under his care, charge and management, and while to a certain extent he is subject to the control of the court, his position is in nowise the same as that of a trustee in bankruptcy.

When a debtor is declared a bankrupt and his property is taken in charge by the court of bankruptcy, the assets are no longer the bankrupt's in the eyes of the law; they belong to the creditors, including the State and the United States, as their claims

are recognized in Section 64. The debtor has not even a voice in naming the person who is to assist the court in getting in and distributing these assets. The assets are in every sense the property of the creditors as they may be ultimately determined in accordance with the provisions of the bankruptcy act. The office of the court is to collect in, convert into money, and distribute these assets, and in order to enable the court to do this an individual appointed by the court is vested with the title to these assets, and is called a trustee in bankruptcy. Has that trustee the management of the fund after it has been placed in the designated depository? In what sense can a person be said to be a manager who has no authority over a fund, who is unable to perform any act with reference to the same, except as directed by the court? He is really nothing more than an officer of the court, like a sheriff, whose duty it is to convert assets into money, as an officer of the court, and distribute them under the orders of the court. The whole purpose of the bankruptcy act is to convert property of the bankrupt into money and distribute it, and the trustee is an officer of the court who is employed to assist in doing this. It is manifestly improper, therefore, to liken such an officer to a curator or a trustee appointed under a will. If any one can be said to have the management of the fund, it is the court of bankruptcy, and we submit that its office is not to manage the fund, but simply to distribute it.

In the case of In re Kellinger, 9 Paige Ch. 62, Chancellor Walworth held that neither the register

nor the clerk of the court of chancery, nor the court itself, could be assessed as a trustee for funds or securities in their possession belonging to suitors, under a statute making a trustee who has possession or control of the property the owner thereof for the purpose of taxation.

In the case of State v. Irons, 35 N. J. L. 464, the court says: "A sheriff who has collected money on a *fieri facias*, and a clerk of a court who is intrusted with the custody of funds paid into court, are in a certain sense trustees, and occupy a fiduciary position; yet it has never been suggested that they are liable for taxation as trustees on the funds collected or held by them in their official capacity."

A moment's consideration will show that the position of a trustee in bankruptcy is rather to be likened to that of a sheriff or other officer of the court who has temporary charge of property or funds for a specific purpose, and who is acting entirely under the control of the court, than to a trustee under a will or a curator or other person who stands in the place of the owner of the property. A trustee in bankruptcy stands in the place of the court; he is in every sense an officer of the court, and in no sense a representative of the bankrupt.

We think it will readily be conceded that a sheriff would not be taxable under a law providing that the owner or holder of property should be liable for taxes; it may well be supposed that a sheriff who has sold property on the 30th day of May, and has the money in his possession on the first day of June,

may be required to pay it over on that day. Would it be contended that such money in the sheriff's hands could be legally assessed for taxes in the name of such sheriff, unless there were a special provision of the law which expressly made the fund taxable? Such assessment would interfere with the due and proper administration of justice, and in the same way, and to the same extent, an assessment of taxes against a trustee in bankruptcy would interfere with the due and proper adminstration of justice in the bankruptcy courts, and no inference in favor of the right to make such assessments should be drawn.

We submit, therefore, that inasmuch as the trustee in bankruptcy under the law of 1898 is not the owner of the fund in the depository, and has not the care, charge or management of such fund, but the ownership of such fund is in the creditors, and the care and charge thereof is in the court, the statutes of Missouri should not be construed as taxing the trustee on account of such fund.

It may be urged that if the trustee be not taxable, property not specifically exempted by the State law would escape taxation. We submit, however, that this is not necessarily true, since creditors of the bankrupt within the jurisdiction of the State are taxable on account of all property, including solvent notes, and all other property, except merchandise, not specifically enumerated. Section 9144, R. S. Mo., 1899.

Furthermore, even if the property should escape taxation, it would not warrant the imposition of any tax that is not within the letter of the statute, and

certainly would not warrant the taxing by the State of property which is under the exclusive sovereignty of the United States.

In this connection it is to be noted that the tax which is sought to be collected from the bankrupt estate is not the same tax which the bankrupt would have had to pay had he continued in the control and management of his own property, unconverted into money. Presumably the bulk of the bankrupt's property was a stock of merchandise, on which a license tax would have been collected, and which under section 9144 the bankrupt was not required to list for taxation. It follows that the officer of the court while engaged in distributing the fund for the benefit of creditors would under the tax bill in this case be required to pay a different, and, we may add, a larger amount than what the bankrupt itself would have been required to pay if it had remained in possession. We submit that no equities should be invoked in favor of any such tax.

Respectfully submitted,

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